United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2001

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLES JONES-BEY,

Plaintiff-Appellant,

— against —

RALPH G. CASO, County Executive of Nassau County, MICHAEL P. SENIUK, Sheriff of Nassau County, SAUL A. JACKSON, Commissioner of Correction of Nassau County, and WALTER FLOOD, Warden of the Nassau County Correctional Facility,

Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

B
P/S

BRIEF FOR DEFENDANTS-RESPONDENTS AND APPENDIX

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BRIEF FOR DEFENDANTS-RESPONDENTS

Counter-Statement of Facts

By complaint filed in the office of the Clerk for the Eastern District of New York on December 8, 1972, a class action was brought on behalf of all pretrial detainees in the Nassau County Correctional Facility (NCCF) entitled *Palma, et al* v. *Treuchtlinger, et al,* docket no. 72C1653. The Nassau County Legal Aid Society acted as counsel. The complaint was quite comprehensive, and included all aspects of pretrial detention at NCCF. (See Brief for Appellant, App. 4-8). The remedy sought by the class was

not limited to declaratory judgment and injunction, but included as well ". . . such other and further relief as to this Court may seem just and proper." By order dated March 20, 1973, the Court below ordered notice to be sent to all pretrial detainees at NCCF (Brief for Appellant, App. 14). By approval of the Court below, dated June 6, 1975, notice of the prospective settlement of the class action was sent to all class members. (Brief for Appellant, App. 18). By consent judgment signed July 11, 1975, numerous changes were effected at NCCF in relation to the treatment accorded pretrial detainees. No class member sought exclusion from the consent judgment nor did any member opt out of the class.

While the *Palma* v. *Treuchtlinger* action was nearing its final solution, plaintiff-appellant herein, Charles Jones-Bey (appellant) filed a complaint with the Clerk of the Eastern District of New York on February 6, 1975. The allegations by appellant, a pretrial detainee at NCCF, in his complaint, were clearly encompassed by the claims of the class in *Palma* and the eventual consent judgment in that action (See Appendix to Brief herein). There were no allegations in the complaint of appellant which would set appellant apart from any class member in *Palma*.

The first paragraph of appellant's complaint states as follows:

> "This is a civil actions [sic] authorized by 42 U.S.C. sec. 1983 to redress the deprivation, under Color of State Law of Rights, secured by the Constitution of the United States of America; This Court has jurisdiction under 28 U.S.C. sec. 1343. Plaintiff seek [sic] declaratory relief pursuant to 28 U.S.C. sec. 2201 and 2202. (See Appendix to Brief herein.)

Appellant sought precisely the same relief as was sought by the class in *Palma*.

By memorandum decision dated July 15, 1975, the Court below subsumed the claims of appellant as well as claims of other pretrial detainees within the settlement reached in *Palma*.

Appellant claims never to have received actual notice of the *Palma* action. It is also unknown when appellant was actually incarcerated at NCCF. In his complaint, appellant alleges to have been a pretrial detainee since January 22, 1974. (See Appendix to Brief herein); but in a document signed by appellant on September 18, 1975, appellant claims to have been a pretrial detainee at NCCF from August 22, 1974 to May 17, 1975 (Brief for Appellant, App. 17).

Counter-Question Presented

Whether or not the Court below abused its discretion when it disposed of the claims of appellant with the claims of the class in *Palma* v. *Treuchtlinger*.

POINT I

The Court below properly included appellant as a class member in *Palma* v. *Treuchtlinger*.

Appellant contends that his claims against respondents herein were improperly subsumed within the class in *Palma* v. *Treuchtlinger*. Appellant's contentions are based essentially on two theories. First, appellant alleges that he, in fact, received no actual notice of the pendency of the *Palma* action or notice of the proposed settlement therein. Second, appellant contends that he was not properly represented by the class representatives in *Palma* because appellant herein seeks money damages for alleged past wrongs in addition to the equitable remedies of injunction

and declaratory judgment sought by the class in *Palma* (Brief for Appellant, p. 13).

In class actions which are certified as Rule 23(b)(2) class actions, actual notice to all class members is not required. Fed. R. Civ. P., Rule 23(c)(2) provides, in pertinent part:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

The notice requirements provided in Rule 23(c)(2) are inapplicable to the case at bar, which was maintained under Rule 23(b)(2). (Brief for Appellant, App. 13).

The Supreme Court stated in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n. 14, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) as follows:

> "By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)."

See as well *Childs* v. *United States Board of Parole*, 511 F. 2d 1270, 1276 (D.C. Cir. 1974).

The First Circuit, in *Yaffee* v. *Powers*, 454 F. 2d 1362 (1st Cir. 1972), stated the basic policy underlying Rule 23(b)(2) as follows:

> "Although notice to and therefore precise definition of the members of the suggested class are important to certification of a subdivision (b)(3) class, notice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited. In fact, the conduct complained

> of is the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often 'incapable of specific enumeration'." 454 F. 2d at 136b (citations omitted).

See as well *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747, 756 (3rd Cir. 1974).

A Rule 23(b)(2) class action may be maintained even though money damages are sought in addition to injunctive and declaratory relief. *Almenares* v. *Wyman*, 334 F. Supp. 512, 519 (S.D.N.Y. 1971) mod. 453 F. 2d 1075 (2d Cir. 1971), cert. den. 405 U.S. 944, 30 L. Ed. 2d 815, 92 S. Ct. 962; *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 801-802 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 30 L. Ed. 2d 655, 92 S. Ct. 573. The mere fact that appellant sought compensatory and punitive damages in addition to injunctive relief should not set him apart from the class in *Palma*. Only if appellant's claims for damages raised underlying issues which differed substantially from those issues raised by the class in *Palma* should plaintiff be accorded separate treatment. *Nix* v. *Grand Lodge of Int'l Assn. of Mach. and Aero Workers*, 479 F. 2d 382, 385-386 (5th Cir. 1973), cert. den. 414 U.S. 1024, cert. den. 414 U.S. 1138.

It cannot be said that the notice which was ordered by the Court below pursuant to Fed. R. Civ. P. Rule 23(d)(2) was an abuse of its discretion, or that it acted to deny appellant his due process rights. *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555, 564 (2d Cir. 1968); *Frost* v. *Weinberger*, 515 F. 2d 57, 65 (d2 Cir. 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 255-257 (3rd Cir. 1975); *Valvano* v. *McGrath*, 325 F. Supp. 408 (E.D. N.Y. 1971). The mere addition of a claim for damages by appellant should not, as a matter of Due Process,

require the Court to order personal, specific notice to be served upon appellant. The trial court has great discretion, pursuant to Rule 23(d)(2) to determine the appropriate notice to be accorded class members in a Rule 23(b)(2) class action. 7A Wright & Miller, Federal Practice & Procedure ¶1793, at p. 207; *Woodward* v. *Rogers*, 344 F. Supp. 974, 980 at fn. 10 (D.C.D.C. 1972), aff'd without opinion 486 F. 2d 1317 (D.C. Cir. 1973); *Rota* v. *Brotherhood of Railway, Airline & S.S. Clerks*, 64 F.R.D. 699, 707 (N.D. Ill. 1974). Where, as here, the allegations of appellant allege class injuries only, which allegations are fully and completely asserted by the class representatives, the Court should not be required, as a matter of Due Process, to order personal service of notice of the class action and subsequent settlement upon appellant, wherever he may be at the time. Under the circumstances of the case, it cannot be said that the notice ordered by the Court below was an abuse of its discretion within the meaning of Rule 23(d)(2) (Brief for Appellant, App. 14, 18). *Grunin* v. *Int'l. House of Pancakes*, 513 F. 2d 114, 120-121 (8th Cir. 1975); *Dolgow* v. *Anderson*, 43 F.R.D. 472, 500-501 (E.D.N.Y. 1967).

The gravamen of appellant's contention is that, since appellant asked for damages in addition to injunctive and declaratory relief, appellant's interests were at substantial variance with the interests of the other members of the class. Therefore, the representation was ineffectual and appellant was denied his right to be heard.

It is clear from reading the appellant's complaint that there is no antagonism between the claims presented by the class representatives in *Palma* and those presented by appellant. (See Appendix to Brief herein). The issue of antagonism has been well stated by Judge Neaher in *Gates* v. *Dalton*, 67 F.R.D. 21, 630 (E.D.N.Y. 1975) as follows:

> "Case law on the troublesome antagonism question, extensively briefed and argued here, has led to widely divergent results, depending on the factual setting of the case. A few general principles of relevance, however, have emerged. A finding of antagonism sufficient to preclude a truly representative action by plaintiff, may be based on any of a number of different factors, but in every case the conflict must be 'genuine.' *Madonick* v. *Denison Mines Limited,* 63 F.R.D. 657, 658-59 (S.D.N.Y. 1974), and must go to the heart of the controversy. It has often been stated that the 'antagonism must be as to the subject matter of the suit.' *Redmond* v. *Commerce Trust Co.,* 144 F. 2d 140, 151 (8 Cir.), *cert. denied,* 323 U.S. 776, 65 S. Ct. 187, 89 L. Ed. 620 (1944). See 3B Moore's Federal Practice ¶ 23,07[3]; 7 Wright & Miller, Federal Practice and Procedure, *supra,* ¶ 1768."

See as well *Rodriguez* v. *East Texas Motor Freight,* 505 F. 2d 40, 51 (5th Cir. 1974).

7A Wright & Miller, Federal Practice and Procedure ¶ 1775 explains the essential factors in a Rule 23(b)(2) class as follows:

> There are two basic factors that must be present in order for an action to fall within this portion of Rule 23: (1) the opposing party's conduct or refusal to act must be 'generally applicable' to the class and (2) final injunctive or corresponding declaratory relief must be requested for the class. The term 'generally applicable' has been said to signify 'that the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly situated, his acts apply generally to the whole class.' The courts have inter-

> preted this requirement to mean that the party opposing the class has acted either in a consistent manner toward members of the class so that his actions may be viewed as part of a pattern of activity, or has established a regulatory scheme common to all class members. Id, at p. 19.

Clearly, the allegations of appellant in his complaint show only a course of conduct applicable to every member of the class. Appellant in his complaint made no allegations of any actions on the part of respondents which would give rise to a claim for damages applicable specifically or individually to him. (See Appendix to Brief herein).

Absent an allegation of any actions on the part of Nassau County prison officials causing damage specifically to appellant apart from general policies of the Nassau County Correctional Center which affected all pretrial detainees, the appellant has failed to set forth a cause of action for damages. The complaint of appellant relating to damages is frivolous. *Johnson* v. *Glick,* 481 F.2d 1028 (2d Cir. 1973); *Inmates of Attica Correctional Center* v. *Rockefeller,* 453 F.2d 12, 23 (2d Cir. 1971); *Corby* v. *Conboy,* 457 F.2d 251 (1972); *Williams* v. *Vincent,* 508 F.2d 541 (2d Cir. 1974); *Martinez* v. *Mancusi,* 443 F.2d 921 (2d Cir. 1970); *Milton* v. *Nelson,* 527 F.2d 1158 (9th Cir. 1976).

It is abundantly clear that every injury alleged by appellant in his complaint is a class injury (compare Brief for Appellant, App. 4-11 with Appendix in Brief herein). It cannot be said that the Court below abused its discretion in that it did not issue an order of exclusion or severance in favor of appellant, pursuant to Fed. R. Civ. P., Rule 23(c)(4) or Rule 23(d)(2), particularly in view of the fact that appellant never moved for an exclusion order.

CONCLUSION

For the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted,

JAMES M. CATTERSON, JR.
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1 West Street
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NATALE C. TEDONE,
Senior Deputy County Attorney,
Of Counsel

MATTHEW TEDONE,
Law Assistant, On the Brief

APPENDIX

Memorandum

UNITED STATES GOVERNMENT
Memorandum

TO: Hon. Lewis Orgel
Clerk of the Court

FROM: Thomas C. Platt
U.S. District Judge

SSUBJECT: *Jones-Bey* v. *Caso, et al.*

75 C 180

DATE: 3/5/75

Attached are papers from Charles Jones-Bey which purport to set forth a civil rights complaint against Ralph G. Caso, et al.

They should be treated as a complaint, filed in forma pauperis, and a copy of the complaint should be issued and served on the named defendants and the county Attorney of Nassau County.

THOMAS C. PLATT
USDJ

Attachments

Writ of Habeas Corpus Under 42 U.S.C. 1983

UNITED STATES DISTRICT COURT

FOR EASTERN DISTRICT OF NEW YORK

Brooklyn, New York

75 C 180

UNITED STATES OF AMERICA ex rel.
CHARLES JONES-BEY,

Plaintiffs,

—VS.—

RALPH G. CASO, County Executive
Nassau County,

MICHAEL P. SENIUK, Sheriff
Nassau County,

SAUL A. JACKSON, Commissioner of
Correction, Nassau County,

WALTER FLOOD, Warden,
Nassau County Jail.

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(1) This is a civil actions authorized by 42 U.S.C. Sec. 1983 to redress the deprivation, under Color of State Law of Rights, secured by the Constitution of the United States of America: This court has jurisdiction under 28 U.S.C. Sec. 1343. Plaintiff seek declaratory relief pursuant to 28 U.S.C. Secs. 2201 and 2202.

(2) Plaintiff, Charles Jones-Bey, is and has been a pre-trial detainee, here in Nassau County Jail since January

22, 1974, under Nassau County indictment (37764) in Lieu of $5,000 bail, no cash alternative.

(3a) Defendant Ralph G. Caso, is County Executive of Nassau County, he is responsible for all county agencies operation.

(b) Michael Seniuk is sheriff of Nassau County. He is legal responsible for the custody of all pre-trial detainees.

(c) Saul A. Jackson is commissioner of corrections. He is legally responsible for the overall operation of Nassau County Department of Correction; convicted and pre-trial detainees at Nassau County Jail.

(d) Walter Flood is the warden of Nassau County Jail, he is legally responsible for the operation of Nassau County Jail and for the welfare of all the detainees of that jail.

(4) Come now Charles Jones-Bey, in his own behalf; and in the behalf of all pre-trial detainees in this jail, who challenge. That presents practices and procedures here in Nassau County are not in compliance with the free national constitution of the United States of America; thereby subjecting all pre-trial detainees to cruel and unusual punishment and denial of equal protection without due process of the law. BMelow are selected rules and regulation now being enforced in Nassau County Jail which are unlawful.

(a) You are required to wear jail issured clothes while you are here; the only personal clothing you will be allowed to wear, are socks, shoes and underwears.

(b) You are only allowed to make one (collect) phone call a week, on a desinated day any time according to a

very rigid and inconvenient schedule. If your party number is busy you loose your call or call another party.

(c) When admitted, you must give written permission to let the jail inspect all mail. No outgoing mail is to be sent to the mail room sealed, sealed envelopes will be sent back to you. All incoming mail is mutilated, stamp and entire back of envelope removed, detainee only receive front address of envelope. No mail delivered on Saturday, excessive delays in outgoing registered mail.

(d) Only two visits are allowed per week. Each week two people are allowed to see you once each week between Monday and Friday. No visit are allowed on weekends and holidays, no one under 16 years of age allowed. Proof of age and identity are required.

(e) Recreation is given once a week in the summer outdoors and winter indoors.

(f) The medical staff is inadequate, and service render is usually lack professional competence. You must be seriously ill before you get Dental, Psychological or medical service, you must have an appointment with illiness to get on sick call; We have a desinated time to get sick. Sick call is what the Administration call it.

(g) Court transportation procedures are unbeleavable. We are handcuff in group of twos and some times threes, at the county jail around 8:30 A.M. Then we are loaded into a van in groups of 18 per van which seats only 12 or 14 comfortable, little or no ventilation and usually 15 out that 18 light up a cigerette, now we have an smoke fill van over crowded heading from Nassau County Jail, East Meadow, New York desination County Court House, Mineola, N.Y. unload at county court and march into a deten-

tion cell where we remain handcuff until we reach the county jail again that afternoon or evening. No hot meal are serve at court only sandwich in which we bring with us from Nassau County Jail that morning, most times we only go to court for the ride, because seldom do we see judges or lawers or court rooms.

(5) As a result of present administration policies and pratices all pre-trial detainees must suffer the same treatment as those who are incareerated here for punishment, thereby denying all pre-trial of their rights as an ordinary citizen, other than the right to go and come as they please. All pre-trial detainees in this jail have been denied due process of fair treatment as guaranteed by the U.S.C.A. Const. Amends. 8, 14. The plaintiff have no plain adequate or complete remedy at law to redress the wrongs described herein. Plaintiffs have been and will continue to be irreparably injured by the conduct of the defendants unless this court grants the declaratory and injunctive releif which Plaintiff seek. Wherefore, Plaintiff respectfully pray that this court enter judgment granting Plaintiff:

(a-1) A declaratory judgment that the defendant's, policies and practices described here in violate plaintiff rights under the United States Constitution.

(a-2) A preliminary and permanent injunction which:

(b) Require Commissioner Saul A. Jackson and Warden Walter Flood to return pre-trial detainees all jail liberties in which they are lawfully entitled to have; visits, mail, phone calls and etc.

(c) Compensatory damages in the amount of $100,000 to Plaintiff Charles Jones-Bey from all defendants and each of them.

(d) Punitive damages of $15,000 to Plaintiff from all defendant's, except County Executive Ralph G. Caso.

(e) Trial by jury on all issues triable by jury.

(f) Plaintiff cost of this suit.

(g) Such other and further relief as this court may deem just, proper and equitable.

February 3, 1975

Respectfully Submitted,

/s/ CHARLES JONES-BEY
Charles Jones-Bey
in Pro. Se.

Affidavit

State of New York,
County of Nassau, *ss.*:

The undersigned, after first appearing before witness, deposes and says:

(1) That he is a free national citizen of the United States of America, and a resident of the State of New York, presently confined in Nassau County Jail, East Meadow, New York.

(2) That he is the relater herein, and the statement contained in the attached are true and correct to the best of his knowledge, and beleif.

(3) That relator is an indigent, without funds, chattel or property, with which to defray the cost of this instant action, therefore relator respectfully request this honorable court appointed counsel, and grant permission to proceed by in Forma Pauperis.

/s/ Charles Jones-Bey
Charles Jones-Bey

Subscribe and sworn
to before me this 3 day
of February 1975

/s/ Paul H. Holmes
Paul H. Holmes
Notary Public, State of New York
No. 30-4505903
Qualified in Nassau County
Commission Expires March 30, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES JONES-BEY,

Plaintiff-Appellant,

against

RALPH G. CASO, County Executive of Nassau County, MICHAEL P. SENIUK, Sheriff of Nassau County, SAUL A. JACKSON, Commissioner of Corrections of Nassau County, and WALTER FLOOD, Warden of the Nassau County Correctionsal Facility,

Defendants-Respondents.

On Appeal From The United States District Court
For The Eastern District of New York

Affidavit of Service By Mail

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Louis Mark, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 20th day of April 1976 he served three copies of the attached Brief For Defendants-Respondents and Appendix on Robert Hermann, Esq., Attorney for Plaintiff-Appellant, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

Robert Hermann, Esq.
Washington Square Legal Services, Inc.
(N.Y.U. School of Law)
40 Washington Square South - Room 410
New York City, N.Y. 10012

Louis Mark
Louis Mark

Sworn to before me this

20th day of April 1976

Quinton C. Van Wyden

QUINTON C. VAN WYDEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1977